Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Review of the Commission's Regulations	)	
Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations	)	
Review of Policy and Rules	)	MM Docket No. 87-7

SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: **November 5, 1996** **Released:** **November 7, 1996**

Comment Date: February 7, 1997
Reply Comment Date: March 7, 1997

By the Commission: Commissioners Quello, Ness, and Chong issuing separate statements.

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By the Commission:

I. Background

1. Last year, the Commission adopted a broad-ranging *Further Notice of Proposed Rule Making* in this docket.[1] In that item, the Commission proposed a new analytical framework within which to evaluate the Commission's national and local broadcast television ownership rules. In particular, the *TV Ownership Further Notice* set forth a competition and diversity analysis for examining our ownership rules. Based on this analysis, it proposed changes or revisions to the national television ownership rule, the local television ownership rule, and the radio-television cross-ownership rule. In addition, the Commission requested comment as to whether certain broadcast television local marketing agreements ("LMAs") should be considered to be an attributable interest in a manner similar to radio LMAs.

2. On February 8, 1996, the Telecommunications Act of 1996 (the "1996 Act")[2] was signed into law. Section 202 of the 1996 Act directs the Commission to undertake significant and far-reaching revisions to its broadcast media ownership rules, some of which -- like the relaxation of the national television ownership limit -- were proposed in the *TV Ownership*

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[1] *Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making*, 10 FCC Rcd 3524 (1995) (hereinafter *TV Ownership Further Notice*).

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996).

Further Notice.[3] Section 202 also requires us to review other aspects of our local ownership rules which were also the subject of the *TV Ownership Further Notice*. In particular, Section 202 requires the Commission to do the following: 1) to conduct a rulemaking proceeding concerning the retention, modification or elimination of the duopoly rule;[4] and 2) to extend the Top 25 market/30 independent voices one-to-a-market waiver policy to the Top 50 markets, "consistent with the public interest, convenience, and necessity."[5] Additionally, both the Act and its legislative history contain statements regarding the appropriate treatment of existing television local marketing agreements ("LMAs") under our ownership rules.[6] Because our previous request for comments occurred before the enactment of the 1996 Act, we believe inviting additional comments pertaining to the duopoly rule, the radio-television cross-ownership rule, and the treatment of existing television LMAs is appropriate.

3. As we noted in the *Television Ownership Further Notice,* "our concern with diversity is most acute with respect to local ownership issues."[7] We believe that we should proceed with reasonable caution to consider the impact of changes in industry structure made possible by the new legislation and by other forces changing, often in unpredictable ways, the marketplace for video programming may have on diversity. In light of the 1996 Act requiring a careful re-evaluation of our ownership rules, we believe it is important to solicit further comment on a number of issues before making final decisions in this proceeding. We confine this *Second Further Notice* to issues related to our local television ownership rule (the duopoly rule), the one-to-a-market rule, and LMA grandfathering issues. Issues relating to the national television ownership limit,[8] which was specifically modified by the 1996 Act, were addressed in a previously released *Order* implementing these modifications[9] and are also discussed in a

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[3] Section 202(c) of the 1996 Act eliminates the numerical limit on the number of television stations an entity could own nationally, and raised the national audience reach limit from 25% to 35%. *See Order*, FCC 96-91, 61 Fed. Reg. 10691 (March 15, 1996) (implementing this provision of the 1996 Act). The *TV Ownership Further Notice,* at 3568, sought comment on relaxing the national ownership rule in a similar manner.

[4] Section 202(c)(2) of the 1996 Act.

[5] Section 202(d) of the 1996 Act.

[6] Section 202(g) of the 1996 Act.

[7] *Television Ownership Further Notice* at 3574.

[8] *See* 47 C.F.R. § 73.3555(e).

[9] *See Order*, FCC 96-91, 61 Fed. Reg. 10691 (Mar. 15, 1996).

separate *Notice of Proposed Rule Making*[10] adopted contemporaneously with this *Second Further Notice*. In addition, issues related to the broadcast attribution rules are the subject of a *Further Notice of Proposed Rule Making*[11] in our attribution proceeding that is also being adopted today.

4. In the sections that follow, we invite comment on several discrete issues prompted by the 1996 Act. We also take this opportunity to solicit further comment in light of our review of comments filed in this proceeding to date. Specifically, we invite comment on our tentative conclusion to modify the local television ownership rule to a generally less restrictive Designated Market Area ("DMA")[12] and Grade A signal contour standard and on a number of specific waiver standards for the local television ownership rule. We also seek comment as we reexamine the radio-television cross-ownership rule in light of the 1996 Act. Finally, we seek comment on how, if we decide to make television local marketing agreements ("LMAs") attributable for ownership purposes, existing LMAs should be treated under the Act and the new rules.[13] These comments will supplement the record gathered in response to the Commission's January, 1995 *TV Ownership Further Notice*. The updated record will facilitate the Commission's efforts to resolve the issues and questions raised in the *Further Notice* and in this *Second Further Notice* prior to our issuing a *Report and Order* in this proceeding.

5. We note that the competition concerns that form an integral part of our analysis are similar in many respects to the analysis conducted by the Department of Justice in reviewing the antitrust implications of mergers, including mergers that involve broadcast stations. The Department's antitrust determinations regarding broadcast station common ownership are indeed relevant to our analysis and we do not wish to duplicate efforts. We also recognize, however, that our jurisdiction and obligation with respect to competition in broadcast markets is not coincident with that of the Department of Justice. Rather, our interests in this area are

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10 MM Docket No. 96-222, 91-221, and 87-8, FCC 96-437 (rel. Nov. 7, 1996) (*National Television Ownership Notice*).

11 MM Docket No. 94-150 and 87-15, FCC 96-436 (rel. Nov. 7, 1996) (*Attribution Further Notice*).

12 A DMA is a registered trademark of the A. C. Nielsen Company. A DMA represents a geographic area in the U.S. Each DMA consists of counties that, according to Nielsen, can be grouped together on the basis of actual household viewing patterns in those counties. For that reason, stations, networks, advertisers and others find DMAs to be useful in selling and buying advertising time on broadcast television stations.

13 In a companion notice (*see supra* note 11), we seek further comment concerning possible revision of our attribution rules. We deal with issues related to attribution of LMAs in our companion item. The discussion of LMA issues in this *Further Notice* relates only to the grandfathering of existing television LMAs. *See infra* at ¶ 83.

complementary.[14] For example, our review of television transfer and assignment applications requires us to assess, unlike the Department of Justice, whether the public interest, convenience, and necessity would be served by the proposed transaction, including an analysis of the diversity effects of the transaction.

6. In soliciting comment on these issues, we note that the ownership rules and the proposals we make in this proceeding are designed for regulating analog television broadcasting. The introduction of digital broadcast television ("DTV") technology may transform the broadcast television market in ways that the current ownership rules may not contemplate.[15] We also note that, looking beyond any rule changes we may adopt in this proceeding, we will be conducting a biennial review of our ownership rules beginning in 1998 as required by the 1996 Act.[16] As part of these reviews, we will be in a position to assess future technological developments such as DTV, and to modify further our ownership rules as necessary.

II. The Local Television Ownership Rule

A. Background

7. Our local television ownership rule presently prohibits common ownership of two television stations whose Grade B signal contours overlap.[17] The *TV Ownership Further Notice* set out a comprehensive analytical framework for reviewing this rule in light of three principal goals. First, we seek through our local television ownership rule to promote diversity, particularly program and viewpoint diversity.[18] Second, we intend to foster the competitive

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[14] *See Jacor Communications, Inc.*, FCC 96-380 (released September 17, 1996), ¶ 16.

[15] Digital encoding and transmission technology will permit a station to broadcast multiple streams of Standard Definition Television ("SDTV") programming, a single High Definition Television ("HDTV") signal, a combination of the two, or a combination with other digital ancillary services. *See Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, Further Notice of Proposed Rule Making and Third Notice of Inquiry*, 10 FCC Rcd 10540 (1995); *Fifth Further Notice of Proposed Rule Making*, 11 FCC Rcd 6235 (1996).

[16] In this biennial review, the Commission "shall determine whether any of such [ownership] rules are necessary in the public interest as the result of competition" and the Commission "shall repeal or modify any regulation it determines to be no longer in the public interest." Section 202(h) of the 1996 Act.

[17] 47 C.F.R. § 73.3555(b) ("No license for a TV broadcast station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the Grade B contour of that station (computed in accordance with 47 C.F.R. § 73.684) and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party.").

[18] *TV Ownership Further Notice* at 3573-74.

operation of broadcast television stations' program distribution and advertising markets.[19] Finally, we seek to promote greater certainty by adopting generally applicable rules.

8. The television industry has grown and changed significantly since 1964 when we adopted the local television ownership rule.[20] In light of those changes, the *TV Ownership Further Notice* sought comment on a number of proposed modifications to the television local ownership rule. These proposals raised questions concerning the appropriate geographic scope of the rule and whether the Commission should permit joint ownership of two stations in the same geographic market.

9. In addition to updating our record in light of the new environment created by the 1996 Act,[21] in this *Second Further Notice* we solicit comment on our tentative conclusion as to the proper geographic scope of the local television ownership rule. This tentative conclusion is based on our review of comments filed to date concerning our earlier proposals and on our own reconsideration of those proposals in light of intervening events since the adoption of the *TV Ownership Further Notice*. This tentative conclusion and specific waiver criteria for allowing common ownership of two television stations in the same market are discussed in Sections B and C. We also recognize that the 1996 Act and additional Commission proceedings may have a

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[19] *Id.* at 3570-72. The *TV Ownership Further Notice* also discussed the effects of the local ownership rule on the video program production market. These effects, however, raise lesser concerns than the potential effects on other markets as the video program production market is more national in scope. Producers of video programming typically create product which is marketed for broadcast in more than one local market. *Id.* at 3572.

[20] *See TV Ownership Further Notice* at 3536-39. *See also* F. Setzer and J. Levy, *Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991). Since the rule's adoption, the number of commercial television stations has more than doubled. As of August 31, 1996, there were 1186 commercial television stations in the U. S. *See* FCC News Release, September 6, 1996. At the time the current local television ownership rule was adopted, there were 564 commercial television stations on the air. See the *1995 TV & Cable Factbook.* Multichannel video programming delivery systems have grown substantially. Approximately sixty-four million, or two-thirds of U. S. television households, now subscribe to cable or other multichannel video programming services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, App. G (1995). Accordingly, television viewers have more choices among video programming delivery services than at the time of this rule's adoption.

[21] In a series of *Orders* released this past spring, the Commission implemented a number of provisions of the 1996 Act that (1) eliminated the national numerical limitations on television station ownership and raised the television national audience reach limit from 25% to 35%, *Order*, FCC 96-91, 61 Fed. Reg. 10691 (March 15, 1996); (2) relaxed the dual network rule, *id.*; (3) eliminated national radio ownership limitations and substantially relaxed our local radio ownership rules, *Order*, FCC 96-90, 61 Fed. Reg. 10689 (March 15, 1996); and (4) reformed the broadcast license renewal process, by, among other things, eliminating comparative renewal challenges, *Order*, FCC 96-172, 11 FCC Rcd 6363 (1996).

cumulative effect on the ability of small stations or stations owned by minorities and women to compete effectively in this new environment.[22] We seek comment on what aggregate effect these proposed rules may have on small stations, or stations owned by minorities and women.

B. Geographic Scope of the Rule

10. The *TV Ownership Further Notice* proposed to narrow the geographic scope of the duopoly rule by prohibiting station overlaps on the basis of Grade A contours (with a radius of approximately 30-45 miles) rather than Grade B contours (with a radius of approximately 50-70 miles).[23] We also sought comment on whether Nielsen's DMA was a better measure of a local television market than Grade B signal contours.[24] While some commenters opposed any change of the local ownership rule at all,[25] most advocated a relaxation of the rule, with many supporting some form of the proposed Grade A test.[26]

11. We continue to question whether the Grade B contour best reflects the market in which a television station operates for purposes of our local ownership rule. The *TV Ownership Further Notice* indicated that the area within the Grade B contour does not necessarily reflect

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[22] *See, e.g.*, the Comments of NABOB in response to the *Notice of Inquiry* implementing Section 257 of the Telecommunications Act of 1996, Market Entry Barriers for Small Businesses, GN Docket No. 96-113, 11 FCC Rcd 6280 (1996). NABOB argued that many minority broadcasters have had difficulty competing for desirable properties since the passage of the 1996 Act. NABOB also asserted that it is difficult for minority owned stations to compete against stations that are "rapidly becoming parts of large broadcast groups." *Id.*

[23] These two signal contours are ones to which the Commission makes frequent reference. Grade B represents a signal strength which provides a picture which the median observer would classify as of "acceptable" quality to the best 50 percent of receiving locations at least 90 percent of the time. Grade A provide an "acceptable" picture to the best 70 percent of receiving locations at least 90 percent of the time. See *IEEE Transactions on Broadcasting*, Vol. BC-14, No. 4, December 1968; *see also Amendment of the Commission's Rules, Regulations and Engineering Standards Concerning the Television Broadcast Service, Fifth Report and Order*, 41 F.C.C. 142, 177 (1951). The *TV Ownership Further Notice* stated that the Grade B contour encompasses approximately a 50-70 mile radius around the television station's transmitter while the Grade A encompasses approximately a 30-45 mile radius. *TV Ownership Further Notice* at 3574 n.144.

[24] *See TV Ownership Further Notice* at 3540.

[25] Black Citizens for a Fair Media, AFTRA, AFTRA-Pittsburgh Local, and Press Broadcasting oppose any change to the local television ownership rule. (A list of the commenters is attached as Appendix B. Abbreviations used in the text are those listed in Appendix B.)

[26] The parties supporting such a relaxation were Kentuckiana, Smith, Group W, Centennial, CBS, Pulitzer, Capital Cities/ABC, Malrite, Cedar Rapids, Post-Newsweek, Texas Operators, Golden Orange, Louisiana Television, Dispatch, and Texas Television.

the station's "core market," (*i.e.*, the viewers the station is trying to reach).[27] It further pointed to a number of benefits, including economies of scale, that could be gained by relaxing the rule.[28] Various parties have commented that the Grade B contour test should be relaxed because stations with overlapping Grade B contours are generally unlikely to have enough viewers in common to raise competition or diversity concerns if the stations were jointly owned.[29] Commenters also pointed to the greater number of alternatives now afforded many viewers with cable and other multichannel video program services.[30]

12. While we believe the Grade B test may be overly restrictive, we are concerned that the Grade A contour alone may not be the appropriate measure to adopt in its place. We recognize that in the *TV Ownership Further Notice*, we indicated that the record at the time supported moving to a Grade A approach. Upon further consideration of these issues and of the comments submitted in response to the *TV Ownership Further Notice*, however, we believe a combination of the DMA and Grade A signal contours may be a more appropriate measure of the geographic scope of the local television ownership rule.

13. Our tentative conclusion is that the local television ownership rule should permit common ownership of television stations in different DMAs so long as their Grade A signal contours do not overlap.[31] In this section, we set forth the reasons as to why this approach may more accurately reflect a television station's geographic market and may further our diversity and competition goals. We invite parties to comment on this tentative conclusion and how it

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[27] *TV Ownership Further Notice* at 3575.

[28] *Id.* The *TV Ownership Further Notice* cited commenters' asserted savings resulting from streamlining management, marketing, and station administration. The EI Study, at pages 90-91, claimed that eliminating the current Grade B rule would permit savings from combining supervisory and administrative personnel and certain operations. Economists Incorporated, *An Economic Analysis of the Broadcast Television, National Ownership, Local Ownership and Radio Cross-Ownership Rules*, May 17, 1995 (filed on behalf of ABC, CBS/Group W, and NBC), hereinafter, the "EI Study."

[29] *See* Group W Comments at 25 citing EI Study at 88; Capital Cities/ABC Comments at 21; Cedar Rapids Comments at 6.

[30] *See, e.g.*, EI Study at 9-13, Appendix A; Comments of ALTV at 19.

[31] This DMA/Grade A rule is nominally more stringent in very large DMAs than the existing rule because it would not permit common ownership of stations in the same DMA even if they had no Grade B contour overlap. However, the DMA/Grade A rule would, as a practical matter, have little adverse effect on existing broadcasters. As we explain later in this section (in our discussion of grandfathering), we believe that stations with no Grade B contour overlaps in the same DMA are, by and large, already commonly owned and we propose to grandfather these existing combinations of stations. Thus, we believe that there are few stations in the same DMA that could be owned in common under the existing rule that would be disadvantaged by this DMA/Grade A local television ownership rule.

might be superior or inferior to a standard that is based solely on signal contours or one that is based solely on DMAs.

14. The Relevance of DMAs. The record indicates that the DMA provides, as a general matter, a reasonable proxy of a television station's geographic market. We recognized this in the *TV Ownership Further Notice*, at 3577, in stating that "economic and diversity analysis . . . suggests that the DMA region definition may be more descriptive of a broadcast television station's potential market." For example, in its reply comments, Allbritton stated that DMAs "are workable, marketplace-recognized boundaries delineating common viewing patterns in areas of effective competition that facilitate transactions between advertisers and broadcasters."[32] CCA and ALTV also argued that the DMA was the relevant geographic market for local advertising.[33] The principal economic studies of broadcasting competition and diversity submitted in this proceeding -- filed by Economists Incorporated[34] and NERA -- also employed DMAs as the relevant geographic market in local advertising and in delivered video programming markets.[35]

15. The Commission has previously noted that the "benefit of the DMA definition is that it attempts to capture the actual television viewership patterns and each county is assigned to a unique television market, unlike the Grade A and B contour standards which ignore the carriage of broadcast signals over cable systems."[36] Thus, DMAs are designed to reflect actual

[32] *See* Allbritton Reply Comments at i, 3.

[33] *See* Comments of CCA at 14; Comments of the ALTV at 7-8.

[34] *See* EI Study at 48-59. The EI Study looks at diversity "markets" defined by conducting the analytical exercise of imagining that a particular group of media, controlled by a hypothetical monopoly, has begun to produce news and public affairs programming with a monolithic (*e.g.*, liberal or conservative) viewpoint. Then EI asks what, if any, sources of alternative (in this case, political) viewpoints are available to consumers, to which they *could* turn. Additionally, EI asserts that it is necessary to ask what suppliers of other programming (*e.g.*, entertainment) could switch to the production of differing viewpoints on local news and public affairs. Table 7 is cited at 59 by EI as an "example" illustrating their approach to diversity. Table 7 relies on DMAs as measures of the geographic market.

[35] *See* the EI Study at 14, 29-32 and Appendices B and F. *See also* Howard P. Kitt and Phillip A. Beutel, National Economic Research Associates (NERA), Inc., *An Economic Analysis of the Relevant Advertising Market(s) within Which to Assess the Likely Competitive Effects of the Proposed Time Brokerage Arrangement between WUAB Channel 43 and WOIO Channel 19* (filed on behalf of Malrite), July 15, 1994, at 2-3. Finally, *see* Sumanth Addanki, Phillip A. Beutel, and Howard P. Kitt, NERA, *Regulating Television Station Acquisitions: An Economic Assessment of the Duopoly Rule* (filed on behalf of the Local Station Ownership Coalition), May 17, 1995, at Tab K.

[36] *See TV Ownership Further Notice* at 3540.

household viewing patterns and advertising markets -- critical ingredients for determining a station's geographic market, both for competition and diversity purposes.

16. In designating DMAs, Nielsen collects viewing data from diaries placed in samples of television households four times a year. Nielsen assigns counties to DMAs annually on the basis of television audience viewership as recorded in those diaries.[37] Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in that DMA.[38]

17. Nielsen audience ratings data are used by television stations in deciding which programming should be aired, and by advertisers and stations in negotiating advertising rates.[39] Moreover, DMAs reflect the fact that a station's audience reach, and hence its "local market," is not necessarily confined to the area of its broadcast signal coverage. Rather, a station's over-the-air reach can be extended by carriage on cable systems and other multichannel delivery systems, as well as through such means as satellite and translator stations.[40]

18. The Commission traditionally has employed a similar geographic measure to the DMA in other rules. That geographic measure is the Area of Dominant Influence ("ADI"), used by the Arbitron Company to define a television station's geographic market according to audience viewing patterns. For instance, we now use ADIs to measure "audience reach" under our national television ownership rules,[41] although we have proposed to use DMAs in that context as well.[42] Also, television broadcasters are entitled to assert must-carry rights on cable systems throughout their ADIs.[43] Commercial market measurements such as DMAs and ADIs

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[37] *See Nielsen Station Index, NSI Reference Supplement 1994-1995*, at 1.

[38] *See TV Ownership Further Notice* at 3540.

[39] *See supra* notes 32-35.

[40] For example, Salt Lake City television stations are located in the northeast corner of the state of Utah. However, because of extensive use of microwave and translators, the Salt Lake City DMA encompasses the entire state of Utah and portions of other states.

[41] *See* 47 C.F.R. § 73.3555(e)(2)(i).

[42] *See National TV Ownership Notice* in MM Docket No. 96-222, 91-221, and 87-8, FCC 96-437 (rel. Nov. 7, 1996).

[43] We note that the Commission uses ADIs to define the market within which a broadcast television station is entitled to cable must-carry or retransmission consent. However, Arbitron stopped updating its ADI market data in 1993. Accordingly, in future must-carry determinations, the Commission will use DMAs instead

are used by the Commission to define markets in other contexts as well, *e.g.*, waivers of the one-to-a-market rule in the top twenty-five markets and application of the Commission's "cross-interest" policy.[44]

19. We thus invite parties to comment further upon whether the DMA provides a reasonable, general approximation of a television station's geographic market, and whether the DMA is an appropriate basis for application of our local ownership rules. Furthermore, we seek comment on the consistency of DMA classifications from year to year. We recognize that some degree of change in these classifications is inevitable as viewing patterns shift, but ask parties to address whether these changes are so frequent or of such significance that they would undermine our goal of crafting an ownership rule that provides certainty and consistency in its application. We also seek comment on the basis upon which changes in DMA boundaries are made, and on whether boundaries are changed at the request of local broadcast television stations.

20. Supplementing the DMA Test with a Grade A Contour Standard. While it is our present view that DMAs may be better than either Grade B or Grade A signal contours as measures of the market, we also tentatively conclude that we should supplement our proposed DMA-based rule with a Grade A contour criterion. There are at least two reasons why we would include both the DMA and Grade A signal contours in the local television ownership rule. First, because the DMA is based on the preponderance, not necessarily the majority, of audience viewing, broadcast television stations in neighboring DMAs may in fact be such significant competitors that joint ownership should not be allowed. Broadcast television stations with overlapping Grade A signal contours, whether in the same DMA or not, may compete for viewers and advertising dollars. Second, the common ownership of two broadcast stations in different DMAs with overlapping Grade A signal contours may reduce voice and program diversity available to the viewers in the overlap area. Thus, we believe that a supplemental

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of ADIs. *Report and Order and Further Notice of Proposed Rule Making* in CS Docket No. 95-178, 11 FCC Rcd 6201 (1996). We have shifted our reliance on ADIs to DMAs in other contexts as well. *See, e.g.*, *Brissette Broadcasting* 11 FCC Rcd 6319 n.3 (1996) (temporary waiver of the duopoly rule); *Media Communications Partners L.P.*, 10 FCC Rcd 8116, 8116 n.3 (1995) (waiver of the one-to-a-market rule).

[44] We note that waivers of the radio-television cross-ownership rule are based in part upon the number of radio and television "voices" for the top twenty-five ADIs. In smaller markets or in large markets with fewer than thirty voices, stations applying for waivers must meet a more stringent waiver standard than that required of stations in of the top twenty-five markets where there are at least 30 other broadcast voices (see Section III). 47 C.F.R. § 73.3555 Note 7. Also, in applying the Commission's "cross-interest" policy, we have focused on DMAs or ADIs to determine whether various media compete with one another. *See Roy M. Speer*, FCC 96-89, released March 11, 1996. Also, we used ADIs to identify the markets to which we applied our now-repealed Prime Time Access Rule, formerly 47 C.F.R. § 73.658(k) Note 1.

Grade A overlap criterion will serve to forestall potentially anti-competitive and diversity-reducing mergers in the broadcast television industry.

21. Total viewing for a particular broadcast television station may include viewing in counties both within and outside the station's DMA. Nielsen in fact examines all such viewing attributed to stations in counties in and outside the station's DMA and reports this viewing data under the heading "Station Totals."[45] The fact that there is viewing outside the DMA suggests that, at least in some instances, stations in neighboring DMAs may compete for some of the same audience. This may especially be the case in the eastern U.S. where counties and DMAs tend to be smaller than west of the Mississippi River. In these areas it may be that significant portions of an individual station's audience reside in adjacent DMAs, particularly for stations located near DMA boundaries. We seek comment on whether our composite DMA/Grade A rule will adequately address these concerns.

22. The Commission recognizes that actual viewing patterns may not be limited to instances where stations in different DMAs find their Grade A signal contours overlapping. We believe, however, that the areas in which such Grade A signal contours overlap are likely to be among those where the competitive and diversity concerns raised by common ownership of the two stations would be greatest. This is because the Grade A contour represents the core over-the-air market. We seek comment on this belief.

23. A further reason we tentatively conclude that a composite DMA/Grade A rule is advisable is because the DMA designation relies on ratings in both cable and non-cable households in describing the geographic reach and extent of television markets. We note, however, that slightly more than one-third of television viewers do not subscribe to cable.[46] Thus, reliance on a DMA market definition may conceal the extent to which viewers that rely on free-over-the-air television might be harmed from a diversity perspective if the duopoly rule takes no independent account of the extent to which two stations serve the same viewers solely on an "over-the-air" basis.

24. For example, the common ownership of two stations in different DMAs with overlapping Grade A contours will cause viewers that previously had access over the airwaves to two separately owned stations now having one fewer separately owned television station and having potentially one fewer source of program diversity available to them by broadcast. If

[45] These audience data appear in Nielsen's *Viewers in Profile: The Local Market Report*. This publication, which also includes DMA audience figures, is used by television stations and advertisers in negotiating advertising rates.

[46] The October 21, 1996 issue of *Broadcasting & Cable* indicates at page 70 that cable penetration is 65.3 percent of the television household universe of 95.9 million.

those viewers do not subscribe to cable, then the potential decrease in diversity may be especially significant since the total number of television stations available to them will be fewer than the number available to cable subscribers. We seek comment on whether our tentative conclusion to employ a DMA/Grade A local television ownership rule will adequately address this potential diversity concern.

25. We ask for comment on whether there are any other such issues raised by reliance on DMA market designations which the Commission should consider. To the extent that such problems exist and are significant, will adding a Grade A component to the rule remedy them and thereby ease our competition and diversity concerns?

26. Large DMAs and Counties. We believe that a DMA/Grade A approach will generally be less restrictive than the current Grade B signal contour test. There may be some situations, however, where this is not the case, particularly in some geographically large DMAs west of the Mississippi River. In these situations, the DMA may be large enough so that two stations could be situated in the DMA yet not have overlapping Grade B contours; common ownership of the two stations would be permitted under the existing rule but not under the DMA/Grade A approach. We note, however, that a preliminary review of station locations and Nielsen DMAs suggests that there are currently few stations within the same DMA that could be commonly owned under the existing Grade B signal contour standard that are not already jointly owned. We invite comment on whether parties agree with this assessment, and whether, as a practical matter, the issue is essentially mooted by our proposal to grandfather these existing arrangements.[47] In the event this is not the case, we invite comment as to how we should address this issue in defining the local geographic market and implementing the television duopoly rule. One alternative would be to adopt a two-tiered rule under which we would permit common ownership both in cases where there is no DMA/Grade A overlap and in situations where there is no Grade B overlap. Such a rule would be no more restrictive than our current regulation and would not disrupt current ownership patterns. We seek comment on this approach.

27. A related issue concerns the possibility that certain western counties are sufficiently large, measured by area, that populations in cities or towns at opposite ends of the same county watch stations in different DMAs. Nielsen's methodology for assigning counties would nonetheless award the county based on the preponderance of overall viewing in the county. This could, potentially, lead to a situation in which Nielsen assigns a significant portion of the viewing population of that county, say residents of town A, to a DMA with stations that are not viewed by those television households. Such assignment might occur because Nielsen relies on the preponderance of cable and non-cable viewers in both town A and the larger town B at the opposite end of the county. As a result, under a DMA-based duopoly rule, stations

[47] *See supra* ¶ 28.

licensed to towns A and B could not be commonly owned even if their Grade B contours do not overlap and they actually serve entirely different markets. Our preliminary analysis, however, indicates that the number of instances in which this might occur may be small. Indeed, we note that Nielsen has, in certain instances, split counties among different DMAs based on the disparate viewing habits of residents in various locations in the county.[48] We seek comment on whether this assessment is accurate. What would be the appropriate response in the event the record shows that this issue in fact presents a significant problem?

28. Grandfathering. As noted, recognizing that our proposal could disrupt existing ownership arrangements involving stations in the same DMA with no Grade B overlaps, we seek comment on whether we should, if we adopt a DMA/Grade A rule, grandfather existing joint ownership combinations that conform to our current Grade B test. We also seek comment on whether the grandfathered status we propose for existing joint ownership combinations in the same DMA should cease at the time an applicant seeks to assign or transfer a grandfathered station, or whether we should allow the grandfathered status to be transferred to a new owner. In the event we were to grandfather these combinations, the apparently more restrictive aspects of a DMA/Grade A duopoly approach would appear to have little effect on existing broadcasters,[49] while the relaxation of the duopoly standard inherent in the change from a Grade B to a DMA/Grade A criterion would afford broadcasters significant opportunities to obtain the efficiencies which common ownership may offer. We tentatively conclude that, overall, our DMA/Grade A rule will make the local television rule less restrictive without harming our competition and diversity goals.

C. Exceptions and Waivers to the DMA/Grade A Approach

29. The *TV Ownership Further Notice* invited comment on whether, in at least some situations, we should allow a company to acquire stations within the same geographic market. We asked parties to address a number of possible exceptions to a "one station" local ownership rule, such as (1) permitting combinations of two UHF stations located in the same market or permitting combinations of one UHF station and one VHF station located in the same market, and (2) permitting such combinations only if a certain number of independently-owned broadcast television stations remain after the transaction.[50] We also sought comment on the criteria to be

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[48] For example, Kern County in California is split between two DMAs: Bakersfield and Los Angeles. Also, Apache County in Arizona is split between the Phoenix DMA and the Albuquerque DMA. *See DMA Test Market Profiles, 1995*, Nielsen Station Index, A. C. Nielsen Company, 1995.

[49] *See* note 31.

[50] *TV Ownership Further Notice* at 3575-78.

used in a case-by-case waiver approach.[51] In response, a number of parties opposed any relaxation of our current rules,[52] while other commenters urged us to modify our rules to permit same-market combinations in certain circumstances.[53]

30. We invite parties to update the record on the general issue of whether we should permit television duopolies in certain circumstances by rule or waiver. We also seek additional comment on a specific exception and on specific waiver criteria for the local station ownership rule. Specifically, we consider the advisability of affording UHF stations more lenient treatment than VHF stations. We also invite comment on continuing the existing satellite exception to the duopoly rules.[54] There are also several possible waiver criteria that might permit common ownership of stations in the same local market. We solicit comment on the appropriateness of these exceptions and waiver criteria, which we examine in more detail in sub-sections C.1 and C.2.

31. We invite parties to update the record on these issues to reflect the changes effected by the 1996 Act and other recent developments they may believe are relevant. We also reiterate our request that parties arguing for relaxation of the local ownership rule provide specific evidence of the projected economic benefits of such relaxation.[55] We seek to develop better quantitative estimates of the efficiencies that may result from greater ownership concentration in local broadcasting in order to weigh these benefits against the potential harm of such concentration to competition and diversity.

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[51] *Id.* at 3576.

[52] *See supra* note 25.

[53] *See* Centennial Comments at 2 (Grade B contour overlap prohibition should be maintained, any relaxation to Grade A contour delineation should be limited to UHF stations, any relaxation to permit joint ownership where city grade contours overlap should be limited to UHF licensees that are not group owners and only upon a showing of public interest benefit); NBC Comments at 27 (permit Grade A overlap as long as 7 separately owned stations remain and competition not harmed); CBS Comments at 57 (public interest showing supports joint ownership); Lee Comments at 5-6 (permit some Grade A overlap); Group W Comments at 28 (permit overlap involving at least one UHF station in the Top 25 markets); Golden Orange Comments at 2, Ellis Comments at 6, ALTV Comments at 29, MAC Comments at 8, Louisiana Television Comments at 2-7, NBC Comments at 26, New World Comments at 25-26 (permit UHF/UHF and UHF/VHF combinations); Texas Television Comments at 2, 5-7 (permit UHF/UHF combinations); Cedar Rapids Comments at 6 (permit overlapping Grade A contours); New World Comments at 24 (first come, first served basis provided six separately-owned licensed stations remain in medium and large markets); WYDO Comments at 3-5 (own up to 50 percent of a local market share).

[54] *See infra* ¶ 37.

[55] *TV Ownership Further Notice* at 3576.

32. In addition, we seek further evidence regarding the relationship between ownership and diversity. Greater ownership concentration traditionally has been thought to reduce diversity.[56] We seek comment, analysis and evidence on whether it reduces viewpoint and program diversity. For example, would a single owner of two stations be less likely to present diverse opinions, and less likely to serve diverse audiences, than would two unaffiliated owners? Conversely, would an owner of two stations in a market be more likely to counterprogram and thereby serve the interests and views of more viewers?[57] With respect to these questions, what can we learn from the waivers of local television ownership rules that we have already granted? Have they led to a decrease or an increase in programming or viewpoint diversity? Similarly, taking account of the important differences between television and radio, what can we learn from "radio duopolies," which have been permissible since 1992?

1. Exceptions

a. Distinguishing Between UHF and VHF Stations

33. In response to the *TV Ownership Further Notice*, several parties raised a threshold issue in arguing that local television station combinations involving UHF stations should receive more favorable treatment than those involving VHF stations.[58] We invite parties to comment on the extent to which we should explicitly distinguish between UHF and VHF stations in determining whether to allow common ownership of stations in the same market. In particular, should we treat the common ownership of UHF stations in the same DMA or even in the same city more favorably than that of non-UHF stations? As several parties noted,[59] some UHF stations are major network affiliates with large market shares, but many are not. These parties

[56] *See, e.g., First Report and Order*, Docket No. 18110, 22 F.C.C.2d 306, 310-311 (1970); *see generally TV Ownership Further Notice* at 3550-3551. Similarly, our minority ownership policy has been premised on the belief that minority ownership and participation in station management is in the public interest because it increases the diversification of control of the media and the diversity of program content. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980-982 (1978).

[57] *See TV Ownership Further Notice* at 3550-51 (citing studies that argue that a monopolist may have an incentive to air diverse programming to generate the largest collective audience it reaches).

[58] ALTV, Tribune, and Silver King argue that UHF stations are not assured of must-carry on cable even if the Supreme Court rules favorably because historic signal disparities permit cable systems, under the 1992 Cable Act, to file a petition claiming that the cable community is not located in the station's market. Furthermore, they allege that VHF stations remain more attractive to networks than UHF stations, and that UHF can compete with VHF on signal quality only at great expense. *See also* Comments of Centennial, Louisiana Television, Dispatch, Tribune, Jet, Golden Orange, and Texas Television.

[59] *See, e.g.*, Kentuckiana Comments at 7-9; Post-Newsweek Comments at 7.

therefore raise a question as to the continuing validity of the need for differential treatment of UHFs.

34. With respect to our review of the local television ownership rule, we ask whether the reasons historically given for distinguishing between VHF and UHF stations remain valid for some purposes.[60] Commenters who believe UHF disadvantages exist and remain relevant to Commission policy concerns should state whether this issue is better addressed by looking at those factors directly as part of a case-by-case waiver analysis rather than as part of a general UHF-based exception to the rule.

b. Satellite Stations

35. Television satellite stations are authorized under Part 73 of the Commission's Rules to retransmit all or part of the programming of a parent station. The two stations are ordinarily commonly owned.[61] Satellite stations are generally exempt from our broadcast ownership restrictions. An application for television satellite status will be presumed to be in the public interest if the applicant meets three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station.[62]

36. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations. Later we began to authorize satellite stations in smaller markets already served by full-service operations but not reached by major national networks. More recently, we have authorized satellite stations

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[60] Pursuant to Section 73.3555(e)(2)(i) of the Commission's Rules, we attribute UHF facilities with only one half the audience reach of VHF stations in the same market when calculating a group station owner's national audience reach. This "UHF discount" policy was adopted in 1985 as the result of a concern that UHF stations had inherent signal reach limitations compared to VHF stations. In the *National TV Ownership Notice* adopted today we defer consideration of the question of the UHF discount until our biennial review of our broadcast ownership rules that we will conduct in 1998 pursuant to the 1996 Act. As part of that review we will examine the continuing need for the discount policy. *See National TV Ownership Notice* in MM Docket No. 96-222, 91-221, and 87-8, FCC 96-437 (rel. Nov. 6, 1996). Parties are invited to comment on any specific ownership issues they believe the Commission should review in particular as part of its overall 1998 biennial review of these rules under the 1996 Act.

[61] *See Television Satellite Stations, Report and Order*, 6 FCC Rcd 4212 (1991) (petition for reconsideration pending).

[62] *Id.*

in larger markets when the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station.[63]

37. We presently see no reason to alter our current policy exempting satellite stations from our local ownership rules.[64] Our satellite station policy, resting in significant part on the satellite station's questionable financial viability as a stand-alone operation, has furthered our ownership policies by adding additional voices to local television markets where otherwise no additional voices might have emerged. The criteria we utilize to evaluate requests for satellite status -- including service to underserved areas and a demonstrated unwillingness by potential buyers to operate the station on a stand-alone basis -- ensure that satellite operations are consistent with our underlying goals of promoting diversity and competition. Under these circumstances, we believe that continued exception of satellite stations from the local ownership rules is appropriate. We invite comment on this conclusion.

2. Waivers

38. We sought comment in the *TV Ownership Further Notice* on a number of general criteria that might be considered in a case-by-case approach in allowing common ownership of stations within the same local market. These criteria included the financial condition of the station to be purchased, the competition and diversity characteristics of the market, potential public interest benefits, and the number of independent suppliers serving the market.[65] We now seek comment on the more specific waiver criteria described in sub-sections 2.a through 2.e. While we believe that it is proper and consistent with congressional intent to seek comment on these waiver criteria, we reaffirm that "our concern with diversity is most acute with respect to local ownership issues."[66] We intend to proceed cautiously with respect to waivers of the television duopoly rule to ensure that broadcast television licensees continue to serve the public interest, convenience, and necessity. Pending the outcome of this proceeding, we will follow

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[63] *See* Note 5 to Section 73.3555 of the Commission's rules. There are 107 licensed satellite stations. *See* BIA MasterAccess TV Database, BIA Publications, Inc., Chantilly, VA 22021. They are a small proportion of the total of 1550 full-power television stations licensed as of August 31, 1996. *See* FCC News Release No. 64958, September 6, 1996.

[64] *See* 47 C.F.R. § 73.3555, note 5. In addition, pursuant to 47 C.F.R. § 73.3555(e)(2)(ii), we do not count the audience reach of satellite stations when calculating a group television station owner's national audience reach. However, in the pending national television ownership proceeding, we have proposed to repeal that satellite exemption when the parent and satellite stations are in separate markets. *See National TV Ownership Notice* in MM Docket No. 96-222, 91-221, and 87-8, FCC 96-437 (rel. Nov. 7, 1996).

[65] *See TV Ownership Further Notice* at 3576-3577.

[66] *See TV Ownership Further Notice* at 3573.

an interim waiver policy whereby we will generally grant waivers of the television duopoly rule, conditioned on compliance with the requirements ultimately adopted in this proceeding, where the television stations seeking common ownership are in different DMAs with no overlapping Grade A signal contours. We will be disinclined to grant waiver requests not falling in this category (i.e., those involving stations in the same DMA or with overlapping Grade A signal contours), absent extraordinary circumstances.[67]

a. UHF/VHF

39. We have discussed, as a possible exception to the local television ownership rule, exempting certain UHF combinations from the application of the local television ownership rule. Another approach toward the same end would be to create waiver criteria by which the Commission might waive the application of the rule for certain UHF combinations. Many of the comments from parties on possible criteria to be used in permitting common ownership of stations within the same local market focussed on permitting combinations involving UHF stations. Golden Orange and Louisiana Television argued that UHF/UHF and UHF/VHF combinations should be allowed without restriction. Alternatively, they suggested that combinations should be allowed in DMAs where there is substantial independent competing media, with media defined to include broadcast video, cable systems, and local daily newspapers.[68] Media America Corporation ("MAC") argued that joint television ownership can promote localism and may be the only way for local broadcasters to compete with national media conglomerates. MAC limited its proposal to combinations where at least one of the merging companies was a UHF station in markets where four full-power television voices would remain after the transaction.[69]

40. Given these comments, we request additional comment on whether we should treat UHF station combinations differently from VHF combinations with respect to local ownership and, if so, how. Commenters citing disadvantages that they believe UHF stations continue to suffer should also list very specific criteria for waiving the duopoly rule that would correspond to those disadvantages, e.g., small audience share or limited area of signal coverage. We ask parties to comment on the use of such criteria in granting waivers in light of our competition and diversity goals. In addition, while the 1996 Act itself is silent on the question, the *Conference Report* to the Act states that "[i]t is the intention of the conferees that, if the Commission revises the multiple ownership rules, it shall permit VHF-VHF combinations only in compelling

[67] *See supra* ¶¶ 56-58.

[68] *See* Comments of Golden Orange at 2-3; Comments of Louisiana Television at 2.

[69] *See* Comments of Media America at 8.

circumstances."[70] Thus, we seek comment on whether there are particular locations (such as Alaska or Hawaii) where there are such compelling circumstances that the Commission might allow some VHF/VHF combinations for reasons analogous to those cited in support of UHF combinations.[71] Commenters supporting this view should describe the nature of the showing that should be required and the effect of any such waivers on diversity and competition in these markets.

b. Failed Station

41. We invite comment on whether, if an applicant can show that it is the only viable suitor for a failed station, the Commission should grant the application regardless of contour overlap or DMA designations. A "failed" broadcast station for purposes of our one-to-a-market rule waiver standard is a station that has not been operated for a substantial period of time, *e.g.*, four months, or that is involved in bankruptcy proceedings.[72] We ask whether this failed station standard would be appropriate in evaluating a potential duopoly application.[73] We invite comment on whether it is preferable to have two operating stations with a single owner than to have one operating and one dark station. The Commission also invites comment on whether any such standard should be relatively strict or generous. For example, should only failed stations qualify, or should we consider failing stations as well? If so, what is the appropriate definition of a failing station? Should applicants be required to demonstrate that they are the only qualified and viable purchaser for the failed stations? We seek comment on whether this standard is appropriate, on how a demonstration that a station has "failed" or is failing might be accomplished.

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[70] S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996) ("Conference Report").

[71] *See* 142 CONG. REC. S687, S705 (daily ed. Feb. 1, 1996) (colloquy between Senators Hollings and Inouye suggesting that the television market in Hawaii may raise the type of compelling circumstances that would warrant common ownership of two VHF television stations in the same market).

[72] *See* note 7(2) of 47 C.F.R. § 73.3555.

[73] We note that in the *Sixth FNPRM* in the DTV proceeding we stated that no new NTSC applications would be accepted beyond 30 days after publication of the item in the Federal Register. However, under the proposed definition of a failed station, the station would have retained its license and would not need to make application for a new one. *See Advanced Television Systems and their Impact on the Existing Television Service, Sixth Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 61 Fed. Reg. 43209, ¶ 106 (rel. Aug. 14, 1996)("*Sixth FNPRM*").

c. Vacant and New Channel Allotments

42. In our recent *Sixth Further Notice of Proposed Rule Making* ("*Sixth FNPRM*") in the DTV proceeding, we proposed to delete all vacant TV allotments in order to provide existing television stations with DTV allotments with comparable coverage.[74] In the *Sixth FNPRM*, however, we indicated that "in some communities -- mainly rural areas -- unused channels may remain even after all existing broadcasters receive allotments."[75]

43. In the *Sixth FNPRM*, we sought comment on whether and how we should make such vacant channels available. Among other questions, we asked:

> Should we consider other possibilities, such as permitting existing broadcasters, either individually or jointly, to use the available channel or channels for additional broadcast or subscription programming? Should we permit broadcasters in a community to propose . . . an allotment plan that would allow them to use, jointly or individually, more than one vacant channel apiece?[76]

44. We also reiterate our question from the *Sixth FNPRM* whether we would be required in this situation to consider other mutually exclusive applications.[77] In *Ashbacker*, the Supreme Court held that the Commission is required under Section 309 of the Communications Act[78] to give consideration to all *bona fide* mutually exclusive applications.[79] In so holding, the Court did not, however, preclude the Commission from establishing threshold qualification standards that must be met before applicants are entitled to comparative consideration. Indeed, in *Storer*, the Court held that, in the context of a rule making proceeding, the Commission may

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[74] *Id.*

[75] *Id.*, ¶ 45. Also, we noted that "in Bangor/Orono, Maine, currently there are four NTSC stations. The . . . DTV Table of Allotments provides DTV allotments for these four stations. However, even considering LPTV and TV translator operations, there appears to be sufficient spectrum in this area to operate a number of additional channels, either NTSC or DTV." *Id.*, n.22.

[76] *Id.*, ¶ 46.

[77] *See Ashbacker Radio v. FCC*, 326 U.S. 327 (1945).

[78] 47 U.S.C. § 309.

[79] *See also Reuters Ltd.v. FCC*, 781 F.2d 946 (D.C. Cir. 1986); *Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry*, 10 FCC Rcd 10541, 10545 (1995).

establish eligibility standards that applicants must meet in order to receive comparative consideration.[80]

45. We invite comment on whether we should entertain a waiver request to the local television ownership rule to enable a local broadcast television licensee to apply for a channel allotment that has long remained vacant or unused, *e.g.*, five years. We believe that it may not be in the public interest to have allotted broadcast channels lie fallow -- particularly in markets where it might be possible to allow additional NTSC stations to come on the air without adversely impacting the proposed DTV allotment table and the transition to digital television. Evidence that an allotment has remained vacant for five years, or evidence of a pattern of failure in applications for that allotment, may suggest that the operation of another television station on a stand-alone basis in the community in question is not economically viable. In those circumstances, the public interest in diversity may be advanced by permitting an existing station in the market to acquire the station, rather than allowing the channel to remain unused. Similarly, if it is possible to create new channel allotments in a market without interfering with nearby channels and without adversely impacting the proposed new DTV allotment table,[81] we seek comment on whether the Commission should entertain applications by an incumbent television licensee to establish a new channel in a market.[82] We note that there currently is a freeze placed on new applications as the result of our DTV proceeding.[83] We anticipate that, in the event we adopt a vacant channel waiver criterion, it would not apply until a DTV table of allotments is finalized in that proceeding.[84] We seek comment on this issue, including whether there may be circumstances where it would be appropriate to consider such waiver requests before DTV allotments are finalized.

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80 *See United States v. Storer Broadcasting*, 351 U.S. 192 (1956).

81 We note that these new allotments would not be paired with an additional DTV conversion channel as contemplated in our proposal to allow existing broadcast television stations to convert to digital technology. *See Sixth FNPRM*, 61 Fed. Reg. 43209.

82 For example, a channel study of Bangor and Portland (ME) suggests that some additional UHF stations could be added in Bangor and some additional UHF stations in Portland. In such situations, local television broadcasters might no longer be prohibited from filing applications for the vacant allotment or from petitioning to change the Table of Allotments. If the local broadcaster was found to be qualified, a license for a second station in the market might be granted in these circumstances. We note that, unless we establish new more restrictive threshold eligibility criteria, the broadcaster's application would be subject to competing applications as provided under our rules (47 C.F.R. § 73.3564(c)), which could require a comparative hearing.

83 *See supra* note 72.

84 *See Sixth FNPRM*, 61 Fed. Reg. 43209.

46. A vacant channel waiver criterion is analogous to waivers for failed stations. We believe that granting waivers for failed stations and vacant allotments would be consistent with our objective to advance diversity and competition. We therefore seek comment on whether these failed and vacant channel waiver proposals increase the amount and diversity of programming and viewpoints available in the market. Similarly, we seek comment on a possible competitive or economic efficiency rationale for prohibiting existing broadcasters from expanding their capacity into unused broadcast spectrum that no other person wants to use. Specifically, we ask commenters to discuss the rationale that unassigned channels might need to be preserved for new broadcasters to accommodate future growth in demand for local television broadcasting. We solicit comment on these observations and especially upon the feasibility of this proposal given the proposed new DTV allotment table.

d. Small Market Share/Minimum Number of Voices

47. In addition, the Commission seeks comment on whether it should entertain waivers to allow joint ownership of stations that (1) have very small audience or advertising market shares and (2) are located in a very large market where (3) a specified minimum number of independently owned voices remain post-merger. The purpose of such a waiver standard would be to enhance competition in the local market by allowing small stations to share costs and thereby compete more effectively. It could also increase the availability of programming and, perhaps, program diversity were such stations to use their economic savings to produce new and better-quality programming or related enhancements. Such advantages may be particularly helpful to small and independent UHF stations.

48. Market Share. We seek comment as to the size of market shares that would be sufficiently low to meet this standard. We also seek comment on whether a small market share waiver standard would tend to limit the application of this waiver standard, either absolutely or generally, to UHF stations and to independent stations not affiliated with any major network. In addition, if after a duopoly waiver is granted, such joint ownership results in the previously struggling stations developing large shares of the viewing audience, should the Commission terminate the waiver for joint ownership in the event the owner seeks to assign or transfer the stations' licenses?

49. Minimum Number of Voices. The *TV Ownership Further Notice* discussed whether waivers would be appropriate where a sufficient number of independently owned

broadcast television voices remained in the market post-merger.[85] Several parties argued for variations on similar waiver standards.[86]

50. We have previously sought comment on whether a minimum of six independently owned broadcast television stations in an ADI is an appropriate standard in light of our competition and diversity goals.[87] In addition, the *TV Ownership Further Notice* tentatively concluded that non-broadcast sources of video programming and local news and information, such as cable, newspapers and radio, are relevant for diversity purposes,[88] and solicited comment on whether such non-broadcast media should be counted for purposes of setting local ownership limits.[89] At the same time, we also emphasized that despite these other media, "we must be cautious in our analysis of outlet diversity" because "[a]ll services are not equally available to the general population."[90] For example, some may be subscription only, others may not be available in all areas.

51. Comments from parties ranged from those that would include a variety of media in addition to broadcast video in evaluating diversity to those that would limit the analysis to broadcast video only. The EI Study, for example, argued for including local newspapers, cable, radio stations, magazines, and Direct Broadcast Satellite Service (DBS) in considering diversity.[91] An alternative point of view is provided by Black Citizens for a Fair Media *et al.* They argue that television is the dominant source of news and must therefore be considered separately from other media.[92]

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[85] *TV Ownership Further Notice* at 3576-78.

[86] NBC argued for a "seven-owner" presumption that a particular transaction was in the public interest if seven independently-owned broadcast stations continued to serve the relevant market. NBC Comments at 27. Cedar Rapids argued for a different type of floor involving 10 separately-owned providers of video media, a standard which would include nonbroadcast video media such as cable. Cedar Rapids Comments at 9.

[87] *Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111, 4115 (1992).

[88] *TV Ownership Further Notice* at 3556-58.

[89] *Id.* at 3576.

[90] *Id.* at 3573-74.

[91] *See* EI Study at 54-56.

[92] *See* the Statement of Dr. Mark Cooper, Director of Research at the Consumer Federation of America, filed with the Reply Comments of BCFM.

52. The Commission's 1995 *TV Ownership Further Notice* raised numerous questions about the extent to which other video and non-video products and services were competitive or diversity substitutes for broadcast television.[93] We noted the lack of unanimity among the parties as to which products and services are substitutes and which are not. Given the many changes that are taking place in the television industry and the lack of consensus in the record, we ask here for comment on whether we should, until we observe further marketplace developments, focus only on broadcast television outlets in counting voices for this proposed waiver.[94] Or, for example, should we give consideration to cable television systems when cable has a very high penetration level in the market? If so, how should a cable system be counted for these purposes? In view of recent developments regarding DBS, Open Video Systems (OVS), and on-line services, we also seek comment on whether and how these services should be counted as voices. For a given minimum number of independently owned broadcast television voices, an approach that counted only broadcast television voices would establish a more difficult standard for station owners in most markets to meet as compared to an approach that included a broader array of media as independent voices. Indeed, such an approach might limit waivers under this criteria to only the very largest markets. However, based on experience gained from granting waivers in these circumstances, we could then consider relaxing the rule further as part of a future biennial review of our ownership rules.[95]

53. Market Size. We also invite comment on whether, if we adopt a small market share and minimum number of voices waiver policy, we should add a market size test. In other words, we might limit waivers based on a minimum number of television voices in the very largest markets. We invite comment on whether the largest markets already have sufficiently numerous competing broadcast television outlets to safeguard our competition and diversity concerns. Or, are there so few such large markets that development of a waiver criterion is not an efficient means to promote diversity? Parties are also asked to comment on the appropriate minimum number of voices under such an approach. For example, should this standard require a minimum number of independently-owned broadcast television stations (including both commercial and non-commercial stations) licensed to communities in the DMA after the proposed transaction? The Commission seeks comment on alternative standards, and whether waivers based on these criteria should be limited, at least for the time being, to only the largest markets.

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[93] *TV Ownership Further Notice* at 3536-3543, 3552-3558.

[94] In our discussion of the radio-television cross-ownership rule, we directly question the degree of substitutability between radio and television. *See infra* ¶ 63. On the basis of evidence available to us at this point, we are not prepared to resolve the issue of whether radio and television can be considered as substitutes. As a result, our discussion of this potential waiver standard for the local television ownership rule will focus primarily on broadcast television stations in a local market.

[95] *See* Sec. 202(h) of the 1996 Act.